

STATE OF MICHIGAN
COURT OF APPEALS

MARY CIPRIANO,

Plaintiff-Appellant,

v

SALVATORE CIPRIANO,

Defendant-Appellee.

UNPUBLISHED

December 27, 2002

No. 233215

Macomb Circuit Court

LC No. 91-004641-DO

Before: O’Connell, P.J., and White and B. B. MacKenzie*, JJ.

O’CONNELL, P.J. (*dissenting*).

I respectfully dissent. Because I cannot agree with the majority opinion that the trial court’s decision reaches the high standard of clear error, I would affirm.

On appeal, this Court must review the trial court’s findings of fact, which will not be reversed unless clearly erroneous. *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). A finding is clearly erroneous if after a review of the entire record, this Court is left with the definite and firm conviction that a mistake has been made. *McNamara v Horner*, 249 Mich App 177, 182-183; 642 NW2d 385 (2002). In a divorce case, the trial court’s dispositional ruling is discretionary and will be affirmed unless this Court is left with the firm conviction that the division was unfair or inequitable. *Sands v Sands*, 442 Mich 30, 34; 497 NW2d 493 (1993). “This Court gives special deference to a trial court’s findings when they are based on the credibility of the witnesses.” *Draggoo, supra*.

I agree with the majority opinion that, contrary to plaintiff’s argument, the trial court was not required to invade defendant’s interests in PCE and C & P Co simply because an earlier mandate of this Court vacated the trial court’s holding not including those interests in the marital estate. See Majority opinion, *ante* at 1, n 1, and 2, n 2. However, I disagree with the majority that plaintiff nonetheless contributed to defendant’s interest in PCE and C & P Co, including those interests in the marital estate.

In a divorce proceeding, property division begins with the determination of marital and separate assets. *Reeves v Reeves*, 226 Mich App 490, 493-494; 575 NW2d 1 (1997). Normally, the marital estate is divided, and each party takes that party’s separate estate. *Id.* at 494.

*Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

However, MCL 552.401 allows a party's separate estate to be invaded "if it appears from the evidence in the case that the [other] party contributed to the acquisition, improvement, or accumulation of the property." The court may consider contribution compensable if the party substantially helps acquire or grow the spouse's separate asset. *Reeves, supra* at 495.

In *Hanaway v Hanaway*, 208 Mich App 278, 281, 292; 527 NW2d 792 (1995), the defendant's father annually gifted him stock, which the plaintiff claimed should have been included in the marital estate. We held that the stock's value did not increase simply by earning interest. *Id.* at 294. Rather, it appreciated because of the defendant's efforts, facilitated by the plaintiff's activities at home. *Id.* We found that the defendant had devoted himself to the business, working long weeks, *id.* at 293, and that at the beginning of the marriage, the defendant worked seven days a week and many late hours. *Id.* at 281.

Nevertheless, the trial court correctly held that there were enough factual differences between this case and *Hanaway* to conclude that the holding in *Hanaway* does not apply. First, plaintiff submitted no evidence indicating that defendant worked excessive hours at C & P Co. Also, PCE was a legal entity, created by defendant's father. Defendant and his siblings owned equal interests in PCE, regardless of the length of time they were employed at C & P Co, if at all. Additionally, defendant's children and his nieces and nephews were gifted smaller, equal interests in PCE. Although defendant and his brother were employed at C & P Co, the trial court found that their work "did not include responsibility for the management of the Company." Further, the court held that "the appreciation in value of Defendant's interest in PCE is also independent of his workplace activity at Cross and Peters Company and independent of his marriage partnership." Plaintiff presented no evidence to the contrary.

In *Reeves, supra* at 490, we held that the appreciation in value of one party's separate assets that were actively managed were included in the marital estate, while the party's separate assets that were passively managed were not included in the marital estate. No facts were presented in the instant case to conclude that defendant actively managed C & P Co, facilitating plaintiff's exclusive care for other areas of the family's life. To prevail, plaintiff was required to establish that PCE's appreciation in value was within the marital estate. See *Dart v Dart*, 460 Mich 573, 576; 597 NW2d 82 (1999). However, plaintiff failed to do so.

Therefore, the trial court's factual findings could not satisfy the clearly erroneous standard, see *Draggoo, supra*, and I am not left with the firm conviction that the court's discretionary dispositional ruling was inequitable, see *Sands, supra*. I would affirm.

/s/ Peter D. O'Connell